Dockendorf Electric, Inc. *and* Local Union 910, International Brotherhood of Electrical Workers, AFL–CIO *and* Local Union 438, International Brotherhood of Electrical Workers, AFL–CIO *and* Local Union 300, International Brotherhood of Electrical Workers, AFL–CIO *and* Local Union 363, International Brotherhood of Electrical Workers, AFL–CIO. Cases 3–CA–18808, 3–CA–18902, 3–CA–18918 (formerly 1–CA–32166), and 3–CA–19316

December 15, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On October 25, 1995, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed an exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exception and has decided to grant the General Counsel's exception[1] and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Dockendorf Electric, Inc., Saratoga Springs, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified.

1. Substitute the following for paragraphs 2(a) and (b).

''(a) Offer Donald Sayer immediate employment in the same position in which he would have been hired in the absence of the discrimination against him, and offer Brian Frigon and Christopher Grant immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make each of them whole, with interest, for any loss of earnings and benefits each of them may have suffered as a result of the unlawful treatment of them, as set forth in the remedy section of this decision.

''(b) Remove from its files and memoranda, records, or other references to the unlawful refusal to hire and to the unlawful refusal to recall or rehire, and the unlawful layoff of Donald Sayer, Brian Frigon, and Christopher Grant, as set forth above, and notify each of them, in writing, that this has been done and the unlawful actions taken against them will not be used against them in any way.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to hire, refuse to recall or rehire, or lay off, or otherwise discriminate against employees in order to discourage them from engaging in activities in behalf of a labor organization.

WE WILL NOT warn employees that if they speak about union matters they will be discharged, or warn them that they can not speak about the Union.

WE WILL NOT warn employees that they cannot engage in union activities or they will be transferred.

WE WILL NOT threaten to lay off employees if they engaged in union activities.

WE WILL NOT interrogate employees about their union membership, or threaten to discharge them if they engaged in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Donald Sayer immediate employment in the same position in which he would have been hired in the absence of the discrimination against him, and offer Brian Frigon and Christopher Grant immediate and full reinstatement to their jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make each of them whole, with interest, for any loss of earnings and benefits each of them may have suffered as a result of the unlawful treatment of them.

WE WILL remove from our files and memoranda, records, or other references to the unlawful refusal to hire, and to the unlawful layoff, of Donald Sayer, Brian Frigon, and Christopher Grant, as set forth above, and notify each of them, in writing, that this

[1] The General Counsel excepts solely to the judge's erroneous reference to discriminatee Brian Frigon as ''Daniel'' Frigon in his recommended Order and notice. This unopposed exception is granted and the recommended Order and notice shall be modified accordingly. We shall also conform the judge's reinstatement language to that traditionally used by the Board. We also correct this same erroneous reference in his conclusions of law, at par. 3.

has been done and that the unlawful actions taken against them will not be used against them in any way.

DOCKENDORF ELECTRIC, INC.

Alfred M. Norek, Esq., for the General Counsel.
James M. O'Brien, Esq., of Saratoga Springs, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based upon charges filed by Locals 300, 363, 438, and 910 of the International Brotherhood of Electrical Workers, AFL–CIO, an order further consolidating cases, amended consolidated complaint and notice of hearing was issued on June 12, 1995, alleging that Dockendorf Electric, Inc. (Respondent) violated Section 8(a)(1) and (3) of the Act.[1]

The complaint, as further amended, generally alleges that Respondent made unlawful statements to its employees, and engaged in unlawful hiring and layoff practices at its jobsites in Ogdensburg and Queensbury, New York, Rutland, Vermont, and Kingston, New York.

Respondent's answers denied the material allegations of the complaint, and on July 17, 18, and 19, 1995, a hearing was held before me in Albany, New York.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by General Counsel and Respondent, I make the following

FINDINGS OF FACT

Jurisdiction

Respondent, a New York corporation, having its place of business in Saratoga Springs, New York, has been engaged in the building and construction industry as an electrical contractor. During the past year, Respondent has derived gross revenues in excess of $1 million, of which an amount in excess of $50,000 was derived from providing services to other enterprises which are directly engaged in interstate commerce. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent further admits, and I find, that Locals 300, 363, 438, and 910 are labor organizations within the meaning of Section 2(5) of the Act. ''Union'' will sometimes collectively refer to the separate Locals or to the International Brotherhood of Electrical Workers.

The Alleged Unfair Labor Practices

I. THE FACTS

Respondent, a nonunion electrical subcontractor, does business in several Northeast States. The issues which arose here relate to its performance of subcontracts in large retail department stores.

Respondent has been in business since about 1979. Douglas Dockendorf, its sole stockholder, is a licensed electrician, having apprenticed in the Union's training program, and early in his career having been a member of the Union.

A. *The Ogdensburg Jobsite*

On about April 8, 1994,[2] Thomas Lawlee, a full-time paid organizer for Local 910, learned from the New York State Department of Labor (DOL) that Respondent was seeking electricians for a Wal-Mart project in Ogdensburg, New York. Lawlee notified other union members, all of whom were interviewed by Dockendorf on May 19. Tape recordings were secretly made by some of the union members of their interviews. The union members interviewed were Lawlee, Michael Davis, Joseph Lesperance, Donald Sayer, and Michael O'Brian, all of whom were journeyman electricians, also called mechanics.

In addition to those union members, Dockendorf also interviewed about 13 other applicants, including Norman Jobin, a helper, and mechanics Jeffrey Mee and Tim Whiteford.

1. The employees' testimony

Thomas Lawlee

At the interview, Dockendorf commented upon Lawlee's 30 years' experience in the industry, which was summarized in his application. Dockendorf informed Lawlee that the pay rate was $14 to $15 per hour which Lawlee said was acceptable.[3] Dockendorf said that he was still interviewing applicants, and would be calling in about 1 week. Then Lawlee announced that he was a paid organizer for the Union and was available for employment. Dockendorf replied, ''O.K. That's fine—O.K. we certainly will give you a shot—I say we're interviewing today and we'll be giving you a call in about 2 weeks. The job won't start for probably a month.''

Dockendorf further told Lawlee that he expected to hire six to seven employees, and would not begin hiring for 3 to 4 weeks. When Lawlee said that he possessed the qualifications for hire, Dockendorf agreed, and said, ''I don't have any problem with what you're doing or who you worked for before. It doesn't make any difference to me. . . . I want

[1] The relevant docket entries are as follows: An original charge and an amended charge in Case 3–CA–18808 were filed by Local 910 on September 2 and December 29, 1994, respectively. A charge in Case 3–CA–18902 was filed by Local 438 on October 11, 1994. A charge in Case 3–CA–18918 was filed by Local 300 on October 3, 1994, and originally assigned Case 1–CA–32166. On October 26, 1994, the General Counsel issued an order transferring Case 1–CA–32166 from Region 1 to Region 3 and designating it Case 3–CA–18918. An original charge, an amended charge, and a second amended charge were filed in Case 3–CA–19316 by Local 363 on April 20, June 2 and 9, 1995, respectively.

On January 19, 1995, an order consolidating cases, consolidated complaint and notice of hearing was issued in Cases 3–CA–18808, 3–CA–18902, and 3–CA–18918.

On June 12, 1995, an order further consolidating cases, amended consolidated complaint and notice of hearing was issued in the above cases, and in Case 3–CA–19316.

On July 3, 1995, an amendment to the order further consolidating cases was issued.

[2] Hereafter, all dates refer to 1994, unless otherwise indicated.

[3] The union journeyman electrician's pay rate is about $19.17 per hour.

people to be on the job and be there and give me a days worth of work—that's what I'm looking for.''

Ordinarily, union members are not permitted to accept employment offered by nonunion contractors. However, Lawlee testified that he had permission to accept such employment, and could retain any wages earned from such work in addition to his union salary.

Lawlee was not thereafter contacted or hired by Dockendorf, and did not visit the jobsite.

Michael Davis

Davis, a union member, gave his resume to Dockendorf. It had several references to Local 910: it noted that after taking a 4-year course with the Union, he became a certified journeyman in that Union; he was the press secretary and chairman of various committees of that Union; he served as a certified apprenticeship instructor; and listed as a reference, the business agent of the Union. He also testified that his experience, listed on the resume, consisted of work for well-known area union contractors.

Dockendorf noted at the interview that Davis had much experience, and told him the wage rate was $15 per hour. Davis said that that was acceptable. Dockendorf said that he would call him, and that the job would begin in 2 to 3 weeks.

Thereafter, Davis was not contacted or hired by Respondent, and did not visit the jobsite.

Joseph Lesperance

Lesperance, a union member with 40 years' experience, was told by Dockendorf that the wage rate was $14 per hour, which might be less than he ''normally'' received, and asked whether that was acceptable. Lesperance replied that it was ''negotiable'' to which Dockendorf answered that Respondent is an ''open shop.'' Dockendorf then said that he would be ''inclined to give you a shot'' if he would work for the wage mentioned, to which Lesperance agreed. Dockendorf said that he would be calling people within the next 3 weeks, from the middle to the end of June, and that he would call Lesperance in a few weeks ''when we actually start to hire.'' Dockendorf also said that he would keep Lesperance in mind ''for sure to come to work.'' He also indicated that it appeared that Lesperance was capable of ''running'' or supervising the job.

Lesperance was not contacted or hired by Respondent, and did not visit the jobsite.

Donald Sayer

Sayer, a union member, testified that Dockendorf told him that he was ''more than qualified.'' Sayer agreed to a $14-per-hour wage rate, and Dockendorf said that when the job began and he was hiring employees, he would call him. Dockendorf also told Sayer that it appeared from his application that most of his work experience had been for union companies. Sayer said that it was.

Not having heard from Dockendorf, on July 26 Sayer visited the jobsite and asked Supervisor James Winslow if Respondent was hiring. Winslow said that no hiring was taking place then, but that he should return the following week, as he expected to discharge one or two workers who were not performing well. Sayer phoned Dockendorf on July 26 at that time and was told that he had just hired the last man he believed he would need. Dockendorf did not recall that conversation.

Sayer returned to the jobsite thereafter on 2 successive weeks and was told that Respondent was not hiring.

Michael O'Brian

O'Brian, a union member, did not disclose his union affiliation during his interview. In fact, in answer to the application's instruction to ''list any important skill or related training'' he wrote ''work electrical field 15 yrs. nonunion.''

At the tape recorded interview, Dockendorf noted that O'Brian had much experience. O'Brian accepted Dockendorf's offer of $13 to $14 per hour. Dockendorf told him that he was not actually hiring that day, but just interviewing, and that the job would not start for another 3 to 4 weeks, at which time he would call.

O'Brian offered that he knew ''every swinging electrician between here and anywhere you wanted to go—I know I've been 15 years non-union. . . . I know all the boys. I could help you out on a crew.'' Dockendorf replied, ''Well that's what I'm looking to put together—obviously—you know.'' O'Brian then said that that was the ''same thing I did for Radec. If a guy come on the job I'd seen him. If he's been working as an electrician I know him.'' Dockendorf responded: ''Right . . . I can say a whole lot about that other stuff . . . and don't say anything about—I just want to put people on there that will give me a days work.'' O'Brian worked for Radec, a nonunion electrical contractor, for 2 years.

Dockendorf also told O'Brian that he had more applicants to speak to that day, but that he was ''95% sure we'll probably put you on.'' Dockendorf also said that Respondent would be hiring within the next few weeks, and that the job would last until September or October, and after its completion Respondent had other jobs, including Vermont and Pennsylvania, which he implied O'Brian could work on. Dockendorf said that Respondent employs about 100 workers during the summer, but has only 30 to 40 in the winter. When O'Brian remarked that he was ''sick of getting laid off,'' Dockendorf replied, ''if you produce for me I'll keep you on. . . . Do a good job for me—you'll stay on—there won't be any layoffs.'' Dockendorf wrote ''hire'' on his application, and stated that he may have written that at the time of the interview.

Not having heard from Dockendorf, O'Brian visited the jobsite 2 weeks after the interview, and also phoned Dockendorf, who told him that he was not sure when the job would start. Thereafter, O'Brian visited the site two or three more times, and was told by Supervisor Winslow that hiring should begin soon.

In late June or early July, Dockendorf told O'Brian to report to work. Respondent's payroll sheet indicates that O'Brian began work in the week ending July 19. He worked for 19 weeks and then quit. His last payday was on November 22.

During his employment with Respondent, O'Brian observed that other workers who had also worked for Radec were then working for Respondent.

2. Respondent's evidence

Dockendorf denied discriminating in hiring against union members. He stated that he is only concerned with getting a day's work from an employee, not whether the worker is a union member.

Dockendorf interviewed about 15 or 16 applicants for employment at the DOL, and of those he interviewed, about 4 or 5 were hired. He stated that at the time of the interviews, he expected that the project would begin within 1 or 2 weeks. However, delays caused by the general contractor resulted in Respondent's work not beginning until mid-July.

Accordingly, about 2 months elapsed from the time of the May 19 interviews until hiring took place and work began in mid-July.

Dockendorf stated that the area in which the project was being built was economically depressed, and as a result many qualified applicants visited the site. He testified that following the DOL interviews, about 30 to 40 applicants visited the jobsite and submitted applications to Winslow, who faxed the applications of qualified workers to Dockendorf. A decision as to hiring was made based upon Winslow's recommendation and upon the applicant's qualifications.

Dockendorf testified that those applicants who were hired were those who appeared at the jobsite, and that all of those hired had visited the site. Following the DOL interviews, he did not contact any of those applicants prior to hiring for the job. He told them at the interview that he would be contacting them because he believed that the job would start within the next 2 weeks, and that hiring would take place quickly. However, the job and hiring for it, did not begin until 2 months later.

Dockendorf stated that when Respondent was directed by the contractor to begin work, positions had to be filled quickly. The most efficient way to do so was to hire the well qualified applicants who had just visited the site, and were available immediately.

Dockendorf conceded that he told Lawlee at the DOL interview that he was qualified for hire, but nonetheless did not hire him because there were many qualified applicants who he knew were available immediately to begin work at the time he needed them to actually start—2 months after the DOL interviews. He knew that those he hired were available immediately because they came to the site shortly before hiring began. He believed that Lawlee, and others he interviewed 2 months earlier would probably not be available had he called them. In addition, the decision to hire was also based upon the applicant's showing ''enough initiative'' to come to the site.

Dockendorf stated that the notation on O'Brian's application that he had worked on nonunion jobs had no effect upon his being hired. Dockendorf also hired three other applicants who he interviewed on May 19: Jeffrey Mee, Norman Jobin, and Thomas Whiteford. Those employees did not testify. The applications of Mee and Jobin, which were given to Dockendorf, do not bear any indication that they were members of the Union.[4]

Supervisor Winslow arrived at the jobsite on June 1. He was the only employee of Respondent from then until the week ending July 19, when a full crew, consisting of Winslow, two helpers, and two mechanics, began work. The two mechanics were O'Brian, who was interviewed on May 19 and who visited the site three or four times before he was hired, and Gordon Stevens, whose application is dated July 18.

The same crew worked the following week, the week ending July 26. The next week, the week ending August 2, in addition to the four employees set forth above, an additional eight employees began work. They included mechanics Jeffrey Mee, who was interviewed on May 19, and who filed an application at the jobsite according to Winslow;[5] John Johnson, whose application is dated August 2; Thomas Whiteford, who was interviewed on May 19; and Glen Woods, whose application is dated July 14.

These employees worked for the next 10 weeks, until the week ending October 18, when certain of them were laid off. Fewer employees were employed in the following weeks, until only two were employed in the week ending December 27. Only one employee was employed in the week ending January 10, 1995, and no further employees were employed on that job thereafter.

3. Analysis and discussion

The complaint alleges, and Respondent admits that on about May 15, it refused to hire mechanics Thomas Lawlee, Michael Davis, Joseph Lesperance, and Donald Sayer for the Ogdensburg jobsite. General Counsel argues that Respondent refused to hire them because of their membership in and activities on behalf of the Union in violation of Section 8(a)(3) of the Act.

General Counsel contends that the evidence establishes that Respondent deliberately failed to contact or hire the applicants because of their union affiliations, and instead it hired those people who did not appear to be affiliated with the Union.

It is clear that Respondent possessed knowledge that applicants Lawlee, Davis, Lesperance, and Sayer had union connections. Lawlee admitted such to Dockendorf; Davis' resume had several references to Local 910; Lesperance was informed that Respondent was an ''open shop'' which might pay him less than he ''normally'' received; and Dockendorf noted that most of Sayer's experience was for union companies.

Dockendorf told the applicants that he would contact them when hiring began. He did not do so. Rather, instead of calling them, he hired individuals who visited the jobsite at the time that the job was starting. He stated that he believed that it was ''understood'' that they should contact him, but he did not tell them that. Thus, at the time of the interview the applicants were told that they were qualified, could expect to be hired, and would be contacted when hiring began. Dockendorf misled them into believing that they would hear from him as to when to report to work. Instead, without contacting them, he hired others.

From this evidence, General Counsel asks that I draw an inference that Respondent was motivated by union animus in refusing to hire Lawlee, Davis, Lesperance, and Sayer.

There is no direct evidence that Respondent possessed animus toward the Union in its hiring practices at Ogdensburg.

[4] The applications stated that there were attached sheets, but those attachments were not offered in evidence. The application of Whiteford was not located by Respondent.

[5] Mee did not testify.

Rather, during the interviews of the applicants with known union affiliations, Dockendorf expressed a completely neutral attitude toward their union membership, stating that he was not concerned about such membership as long as they gave him a full day's work.

However, it appears that those applicants whose union affiliations became known to Respondent, were not hired, and that those applicants who expressed a definite nonunion work record, such as O'Brian, and those whose union affiliations were not known to Respondent, such as Mee and helper Jobin, were hired. ''Such a blatant disparity is sufficient to support a prima facie case of discrimination.'' *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991).

I accordingly find that General Counsel has made a prima facie showing that the union affiliations of Lawlee, Davis, Lesperance, and Sayer were motivating factors in its decision not to hire them for the Ogdensburg jobsite. *Wright Line*, 251 NLRB 1083 (1980).

I find credible Dockendorf's reasoning that he did not contact the alleged discriminatees because at the time he was ordered to begin the job and had to hire employees quickly he did not know their availability, having interviewed them 2 months before. Accordingly, Respondent's explanation is reasonable that given the demands for the immediate hire of mechanics, he hired those who visited the site at about the time of hire.

Thus, the only two mechanics hired at the start of the job were O'Brian and Gordon Stevens. O'Brian, who was interviewed on May 19, was hired only after he visited the jobsite at least three times.[6] Stevens, whose application is dated July 18, began work that week. I credit Dockendorf's testimony that Stevens and all of those hired, visited the jobsite.

Lawlee, Davis, and Lesperance did not visit the jobsite, and Dockendorf was therefore not aware of their immediate availability at the time the job was set to begin. At the start of the job he needed to employ workers who he knew were then available. O'Brian and Stevens were immediately available as they had visited the jobsite. Dockendorf was thus assured of their prompt availability to work. In contrast, Dockendorf would have had to contact Lawlee, Davis, and Lesperance, such contact being 2 months after their interviews, and he testified that had he done so, he believed that he would have found them to be unavailable.

Respondent maintained the same crew for 2 weeks, during the weeks ending July 19 and 26.[7] Thus, Respondent had no need for additional employees during those 2 weeks. The following week, the week ending August 2, however, in addition to O'Brian and Stevens, four more mechanics were hired, all of whom, pursuant to Dockendorf's credited testimony, visited the jobsite prior to their hire. Accordingly, 2.5 months had by then elapsed since his interviews of Lawlee, Davis, and Lesperance. Their availability, in contrast to those who visited the site and were available for hire, was even more remote at that time.

The mechanics hired during the week ending August 2 were Mee and Whiteford, both of whom were interviewed on May 19; Johnson, whose application is dated August 2; and Glen Woods, whose application is dated July 14. As set forth above, I credit Dockendorf's testimony that they visited the jobsite prior to their hire.

The situation with Sayer is somewhat different, however. I credit his testimony, which was corroborated by O'Brian, that he visited the jobsite several times. While at the site, Sayer inquired about work, and spoke to Winslow and Dockendorf about the possibility of being hired. Thus, Dockendorf's condition of hiring, that the employee appears at the jobsite, was met by Sayer. I credit his testimony that on July 26 he phoned Dockendorf from the job trailer and was told that he had just hired the last employee he expected to hire for some time. Dockendorf did not recall this conversation, but did not deny it. The evidence does not support the truth of Dockendorf's statement to Sayer.

Thus, during the week following Sayer's July 26 phone call, which was the week ending August 2, Johnson began work. Johnson, whose application was dated August 2, was obviously hired after Sayer spoke to Dockendorf on July 26, as the hiring process consists of an application being completed, then faxed to Respondent's office, and then a hiring decision being made. Sayer's application was on file on May 19, when he was interviewed at the DOL, and he appeared at the jobsite just as Mee and Whiteford did, who were also interviewed on May 19.

Accordingly, Dockendorf's remark to Sayer on July 26 that he had just hired the last employee he expected to hire was not true. Shortly thereafter he hired Johnson, who worked with Mee, Whiteford, and Glen Woods in the week ending August 2.

Therefore, I believe that Respondent has met its burden under *Wright Line* of proving that it would not have hired Lawlee, Davis, and Lesperance even in the absence of its knowledge of their union affiliations. Thus, as set forth above, Respondent established a legitimate reason for not selecting them, that they had not visited the jobsite, and thus their availability was unknown to it at the time that it began hiring. Respondent's failure to hire individuals from those who it interviewed in May is adequately explained by its need to immediately hire individuals when work began 2 months later. The most efficient way of doing so was by hiring workers from among those who applied at the jobsite at the time it began work. Respondent hired only those who appeared at the jobsite and were then available to work.

Respondent has established a legitimate, recognized practice of ''gate hiring.'' ''Gate hiring practices usually carry with it the connotation that the person actually standing at the gate is the one who is preferred over someone who is not, even if [that person has] an application on file.'' *Bay Control Services*, 315 NLRB 30, 35 (1994). ''Gate hiring . . . means [that] qualified employees who appear at the gate at the right time are the ones who are hired.'' *Bay Control*, supra at 37. General Counsel has failed to show that Respondent deviated from that practice.

Accordingly, I find and conclude that Respondent had an adequate business reason for not hiring Lawlee, Davis, and Lesperance, and that it has met its burden under *Wright Line* of proving that it would not have hired them even in the absence of their union affiliations and activities.

[6] It should be noted that despite O'Brian's obvious nonunion affiliation, Respondent did not contact or ''court'' him prior to his visit to the jobsite, but hired him only after he went to the site, and Respondent was ready to hire.

[7] Employee Boyd worked for 16 hours during the week ending July 26, but did not work before then or after. The record did not establish whether he was a mechanic or helper.

I reach a different conclusion, however, regarding Sayer. Sayer visited the jobsite on July 26 and was told by Dockendorf that he had just hired the last man needed for the job. First, Sayer met the condition established by Dockendorf—that he visit the jobsite. When he visited the site that day, he was erroneously told by Dockendorf that he had just hired the last man needed. The evidence establishes that shortly after that time, Johnson filed an application, was hired and began work. I accordingly find that Respondent has not met its *Wright Line* burden with respect to Sayer.

I therefore find and conclude that Respondent did not violate the Act by its refusal to hire Lawlee, Davis, and Lesperance. I further find, however, that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Sayer.

B. *The Queensbury and Rutland Jobsites*

Brian Frigon, a mechanic and assistant business manager and construction organizer for Local 300, obtained a referral for employment with Respondent from the DOL. He arranged an interview with Dockendorf, and brought with him Howard Metzner, a union member who was a helper. At the jobsite interview of September 9, at which neither revealed their union affiliation, they were hired. Frigon agreed to a salary of $11 per hour. Although they were hired to work at the Rutland, Vermont site, electrical work had not yet begun there, and they agreed to work at the Queensbury, New York jobsite.

Dockendorf told the men that they would meet two other employees at Queensbury, Donald Samplatsky and Ed Marro, who he promised to return to Rutland.

Frigon began work at Queensbury on September 13. Shortly after he arrived, Dockendorf asked him if he was interested in ''running'' the project as foreman in Rutland. When Frigon said he was interested, Dockendorf introduced him to Marro, and told Marro that Frigon would be running the Rutland job.

The following day, Dockendorf told Frigon that he believed that he had good qualifications and a good general knowledge of the trade, and that he did not trust Marro or Samplatsky, the other two electricians who would be working at Rutland. Dockendorf also told him that running that job paid $14 per hour.

From September 15 through September 21, Frigon worked at the Rutland project. On September 15, he was the job foreman. That day, he told Andy Lavallee, an assistant business manager for the Union, to advise Respondent that he and Metzner were union organizers. In this regard, Frigon testified that his responsibilities as a construction organizer included organizing unrepresented electrical employees, and that the most effective way to do so is to seek employment with nonunion contractors, and convince his coworkers to join the Union.

Later that day, Frigon asked Dockendorf if he received a call from Lavallee. Dockendorf replied that he had, but ''it really didn't matter to [me] because [I don't] give a shit as long as you do your job,'' adding that it did not matter whether he was a member of the Union or not. Dockendorf further told him that he would be treated the same as anyone else, noting that he did not know what Frigon's ''situation'' was since they were ''organizing themselves.'' Frigon replied that more employees would be working on the job. Dockendorf responded that that was Frigon's ''priority,'' and that he would have a nonworking supervisor overseeing the job, and Frigon.

The following day, Dockendorf told Frigon that Samplatsky would be coforeman with Frigon, and that he should keep Samplatsky informed of all matters concerning the job.

On September 20, Dockendorf asked Frigon for a letter stating that he was a union organizer. Frigon replied that a letter had already been mailed. That letter, sent by Lavallee dated September 19, stated that Frigon, Metzner, and others were union organizers. Dockendorf told Frigon that he would be held personally responsible for anything that was done wrong on the job. Frigon replied that he could not be held responsible if he did not have the proper materials to install his work. On that day, and previously, on September 16, Frigon had complained to Dockendorf about the lack of materials available on the job.

On September 21, Metzner, in the presence of Frigon and Marro, told Dockendorf that the men had collectively agreed to ask for a $1.50-per-hour raise in pay. Dockendorf replied that his attorney advised him not to speak to them concerning this matter. Frigon asked for his attorney's phone number and Dockendorf did not respond.

That day, Dockendorf could not locate Samplatsky, and asked Frigon, Metzner, and Marro where he was. None of them knew. Dockendorf asked them if they were ''feeding [me] a line of shit.'' Later that day, he told them that the three of them would be transferred to Queensbury, and that Samplatsky would remain at Rutland. At that time, the Rutland crew consisted of only those four men.

The following day, September 22, Frigon, Marro, and Metzner returned to work at Queensbury. Frigon wore a T-shirt with a union logo, whereupon Supervisor Michael Becker commented ''nice fucking shirt for this job.'' Frigon asked if he liked the shirt, and Becker replied that he did not, and did not like what it ''fucking stands for either.''

That day, Christopher Grant, a helper who began work in early August at Queensbury, heard Becker say that if he heard anyone talking any ''union shit'' he would throw him off the job. He said that he did not want ''any of that'' on his job. I find, as alleged in the complaint, that Becker's remark constitutes an unlawful threat to discharge Grant if he spoke about the Union. *Sheraton Hotel Waterbury*, 312 NLRB 304, 316 (1993).

Thomas Fellman, a mechanic and union member, testified that he completed an application at Respondent's office. Thereafter, on September 22, he visited the Queensbury jobsite, spoke to Becker and Young, and was called by Dockendorf that evening and told to report to work the next morning. He did not disclose his union affiliation during the hiring process.

On September 23, Frigon mentioned to coworker Fellman that it was nice working with a skilled craftsman. Dockendorf, who was nearby, and apparently heard the remark, told Frigon that if he did not want to work he did not have to. Frigon answered that he loved to work, to which Dockendorf responded, ''I don't need those god damn comments.'' Frigon replied that his comment was directed at Fellman, not at Dockendorf. Dockendorf angrily responded ''knock those comments off, do you know what I'm saying? Do you understand?''

Grant, who observed the confrontation, asked Frigon in Becker's presence what the argument was about. Frigon said that he would tell him at lunch. During the lunchbreak that day, Frigon told Grant about the organizational drive, and informed him of the benefits of union membership. They went to lunch in Grant's car. Frigon stated that he saw Becker watch them as they exited the car upon their return from lunch.

Grant testified that after his return from lunch and while he was at work, Supervisor Becker asked him what he was doing. Grant replied that he was looking for wire. Becker warned him that if he was just ''walking around here'' he would be fired. Grant replied that Becker could fire him, as Respondent employed people who ''don't know what they're doing.'' Becker demanded that Grant not speak to him in that manner, said that he would call Dockendorf, and also offered to fight Grant. Grant rejected the invitation. Grant stated that during his tenure with Respondent, Supervisor Young had complimented his work, and said that he would get a raise. Grant stated that his work was never criticized.

On September 23, not having received his promised raise to $14 per hour as foreman, Frigon asked Dockendorf for an explanation. Dockendorf said that since Samplatsky was acting as foreman with Frigon, the raise would not be given.

On September 24, Michael Mondella, a mechanic and union member, visited the jobsite and presented his resume to Dockendorf. There was no indication thereon that he was a member of the Union, and he did not disclose his union affiliation. Dockendorf called Mondella that evening and told him to begin work on Monday, September 26. He did so.

On September 26, Frigon and Metzner arrived at work at Queensbury, and placed picket signs in the windows of Frigon's car. The signs stated that Respondent violates employee rights and lies to employees about raises. Before the start of work, they distributed handbills to employees, and to Supervisor Young. The handbill, which urged employees to organize, bore Frigon's name and union affiliation.

Upon walking to his work station, Frigon was confronted by Becker, who demanded that he move his car, because the cars of Respondent's employees were parked elsewhere, and told Frigon that he believed that he should not have the signs in his car. A heated exchange occurred, with Becker repeatedly demanding that Frigon move the car even while Frigon was walking toward the car. Becker threatened to send Frigon back to Rutland if he did not move his car. Becker also demanded that he ''watch [his] attitude'' or he would be sent to Rutland. Becker, who conceded seeing the signs in the car, testified that the general contractor advised him that all cars had to be moved to the rear parking lot, and that Frigon's vehicle was one of the only ones that had not been moved.

The complaint alleges that by this incident, Respondent informed its employees that they could not engage in union and protected, concerted activities, and threatened to cause their removal from jobs if they did so. Thus, Becker who might have had a legitimate reason to ask Frigon to move his car, apparently became incensed when he saw the signs in the car. His demeanor then became hostile, and even as Frigon attempted to comply with Becker's request, Becker taunted and attempted to provoke Frigon. A warning that one's ''attitude'' be watched often refers to one's union activities. I find that Becker's warning that Frigon watch his attitude or he would be sent to Rutland relates to Frigon's protected activity of having the signs in his car, of which Becker disapproved. I find that Becker's warning violated Section 8(a)(1) of the Act. *Manor West, Inc*., 311 NLRB 655, 658 (1993).

During lunch that day, union member Larry Underwood drove his pickup truck around the jobsite with Metzner in the rear holding up the picket signs that had previously been in Frigon's car.[8] At that time, Frigon stood in the parking lot, taking photographs of the truck and its occupants. They also picketed at a roadway entrance to the jobsite. During that time, Grant asked for a sign, and he picketed. The picketing lasted about 20 minutes during the lunch break. Grant testified that Supervisor Young saw him picketing.

Grant testified that upon his return to work after lunch, he was told by Becker, in a ''laughing, snickering'' tone, in the presence of Young, that ''you know, you're the first one to be laid off. You know that, don't you? You're the first one.'' At the end of the workday, Grant saw Dockendorf speak with Becker and Young, and immediately thereafter Dockendorf told Grant that the job was winding down, and that he did not need him anymore.

I find, as alleged in the complaint, that Becker's remark violates Section 8(a)(1) of the Act. Thus, shortly after Young observed Grant engaging in picketing, Becker, in the presence of Young, threatened him with layoff in an offensive, demeaning manner. Such a display could only have been prompted by Grant's picketing. *Chelsea Homes*, 298 NLRB 813, 834 (1990).

Becker and Young admitted seeing Grant engaged in picketing activities. Dockendorf conceded that Young told him that Frigon, Grant, Metzner, and Underwood were driving around the site with picket signs. Dockendorf testified that that was not a problem—they had a right to do whatever they wished on their own time.

Later that day, September 26, Frigon and Metzner were told to report to Rutland the next day.

The following day, September 27, upon arriving at Rutland, Frigon and Metzner placed the same picket signs in their cars as were used previously. Upon entering the building with Mondella and Marro at the start of the workday, they were met by Dockendorf who told them that electrical work was not ready to begin as the contractor had not finished pouring its concrete floor. Dockendorf told Frigon, Metzner, and Mondella that they were laid off due to a lack of work. Frigon asked if they would be recalled, and Dockendorf replied that he was not certain, and that it would depend upon scheduling. Metzner asked when he expected work to pick up, and Dockendorf replied, ''very shortly,'' and said that he would contact him. As they were leaving, Dockendorf told Mondella privately that he would be phoned that evening. However, Mondella was not contacted thereafter. Nor were Frigon or Metzner recalled. Only Samplatsky and Marro remained at Rutland.

Frigon, Metzner, and Mondella then began picketing at the Rutland jobsite entrance, during which they noticed Dockendorf drive past them.

[8] Underwood began work at Queensbury on about September 9, working about 3 weeks. He did not disclose his union membership during his phone interview with Dockendorf, during which he was hired.

On September 28, picketing occurred at Queensbury. Upon his return from lunch, Underwood was told by Becker that picketing had taken place at the entrance to the site, and Underwood was asked why he was not picketing with the others. Underwood replied that he was not aware of the picketing, and would have joined them had he been aware of it.

At about that time, Becker asked Fellman if he was affiliated with the Union. Fellman said that he was. Becker responded that he hated the word ''union'' and that there would be no ''union talk'' on the job. Becker threatened to discharge him if he spoke to ''anyone about unionism.'' Fellman protested that he was there to work, not to organize. On October 3, Fellman quit work to obtain another job. I find, as alleged in the complaint, that Becker unlawfully interrogated Feldman about his union membership, and threatened to discharge him if he engaged in union activities. *Albertson's Inc*., 307 NLRB 787, 791 (1992); *Farm Fresh*, 305 NLRB 887, 891 (1991).

On Friday, September 30, Young asked Underwood and another employee, Michael Trombly, to work that Saturday and Sunday because he was ''falling behind on the job and needed to get the work done.'' Underwood agreed, but later that day, Underwood was laid off by Foreman Bob Williams. Underwood testified that when he was laid off there was still ''quite a bit of work to do.'' He was not recalled for work by Respondent.

Trombly and Underwood began work at Queensbury in the same week, and when he was laid off, Underwood worked with Trombly and one other employee in the kitchen area. Respondent's payroll records show that Trombly worked 45.5 hours in the week that Underwood was laid off. He continued to work for 5 weeks thereafter, until the week ending November 8. His hours in the succeeding weeks were 55, 46, 44, 27, and 11, respectively.

On October 4 and 8, Frigon advised Respondent that he was available for work. On October 24, he, another union official, and Underwood met David Hatin, the city of Queensbury building inspector, at the Queensbury site. They showed Hatin certain alleged safety violations. Dockendorf appeared at the site and Frigon asked him when he would be returning to work. Dockendorf did not reply. Frigon sent a detailed letter, dated October 27, to Hatin, outlining the alleged violations. On November 1, Hatin sent a letter to the general contractor referring to Frigon's letter and requesting that certain items in Frigon's letter be addressed. Dockendorf became aware of Frigon's letter.

On November 16, Frigon learned that Respondent had registered with the New Hampshire DOL seeking electricians for Rutland. The next day he called Dockendorf and, without identifying himself, was questioned regarding his qualifications. Then, when Frigon mentioned his name, Dockendorf said he would not offer him a job.

1. The layoffs of Frigon, Metzner, and Mondella

a. *Respondent's evidence*

Dockendorf testified that Bruce Protiken, the superintendent of Rutland's general contractor, had promised him that all of the concrete slab floors throughout the project would be fully installed by Monday, September 26. However, Dockendorf learned that day that only about 60 percent of the floors had been installed, and that there would thus be a delay in installing the electrical work. Accordingly, Protiken did not want Respondent to maintain a full work crew on the project only to have to stop work and await further progress by other trades.[9]

Accordingly, on September 26, Dockendorf was faced with an oversupply of workers at Rutland, who were to begin a project which he believed would be in full force as of that date. However, when he arrived at the jobsite, he learned that the contractor had only partially completed the concrete flooring, and hence had to lay off three of the crew, Frigon, Metzner, and Mondella. Marro and Samplatsky were retained. It appears that some crew was necessary, even though work was not ready to proceed because certain work continued to be done. Thus, only a reduced work force was needed. This is seen in the fact that Hans and Harbour, who were transferred to Rutland the following week, worked only 8 hours in the following week, the week ending October 4.

Thus, in the week ending October 4, Respondent replaced Frigon, Metzner, and Mondella with Hans and Harbour, who it transferred from the declining Queensbury job.[10] Thus, the crew of five was replaced by a complement of four: Hans, Harbour, Marro, and Samplatsky. Mechanics Marro and Samplatsky had been (a) working on that job since its inception on September 13; (b) transferred from Queensbury where they worked from the inception of that job on July 19; (c) employed by Respondent for 8 or 9 months in the prior year; and (d) promised work in Rutland because they both lived there.

b. *Analysis and discussion*

The complaint alleges that Frigon, Metzner, and Mondella were laid off because of their union activities. It is clear that Frigon and Metzner engaged in union activities which became known to Respondent. Thus, Frigon and Metzner were identified as union organizers, and engaged in picketing and handbilling. Frigon was the subject of an unlawful threat by Supervisor Becker, thus demonstrating Respondent's union animus. The close timing between their union activities and their layoff further adds support to a finding that their union activities were related to their layoffs.

Based upon the above, I find that the union activities of Frigon and Metzner were motivating factors in Respondent's decision to lay them off. *Wright Line*, supra.

However, I cannot find that General Counsel has made such a prima facie showing on behalf of Mondella. Respondent told him to report to work on September 26 in its mistaken belief that a large work force would be needed. However, when Dockendorf learned that on that date that the concrete floor had not been completed, it realized that Mondella's services would not be needed, and properly, immediately laid him off. There was no evidence that Respondent was aware of his union affiliation. Thus, even assuming

[9] I cannot credit Metzner's testimony that Protiken told him that Respondent should have more employees on the job. It is unlikely that the general contractor would confide in Metzner a matter directly relating to Respondent's responsibilities under its contract.

[10] The evidence supports a finding, as testified by Dockendorf, that workers were not needed at the Queensbury job when Hans and Harbour were transferred from there to Rutland. Thus, in the week ending September 27, 32 employees were employed at Queensbury. In the weeks thereafter, 24, 22, 21, 22, 20, 17, 17, and 8 employees worked there, respectively.

that a prima facie case has been proven regarding Mondella, I find no violation in his layoff.

Inasmuch as General Counsel has made a prima facie showing as to Frigon and Metzner, the burden shifts to Respondent to demonstrate that it would have laid them off even in the absence of their union activities. *Wright Line*, supra. I find that Respondent has met its burden with regard to Frigon and Metzner.

First, General Counsel argues that mechanics Frigon and Mondella should have been retained instead of mechanics Marro and Samplatsky. I reject that argument, and find that Respondent validly retained Marro and Samplatsky instead of laying them off in favor of mechanics Frigon and Mondella. As set forth above, Marro and Samplatsky were long-standing employees of Respondent who had been employed at Rutland since its inception. General Counsel further argues that Samplatsky should not have been retained since, as admitted by Dockendorf, Samplatsky had ''absenteeism problems'' due to family matters. However, Respondent was satisfied with his performance, made him coforeman and retained him through the end of the Rutland job, in late March 1995.

Thus, Respondent validly retained mechanics Marro and Samplatsky, instead of laying them off in favor of mechanics Frigon and Metzner. I further find that Respondent validly chose to transfer mechanic/helper Harbour from Queensbury to replace mechanic/helper Metzner. Harbour had been employed by Respondent for 1 year. Respondent had a practice, which will be discussed, infra, of transferring its employees from one project to another.

In assessing the choice between helper Hans and mechanic/helper Metzner, I cannot substitute my judgment for Respondent's in selecting Hans to work on the job. Both became employed at the same time, during the week ending September 20. There apparently was no need for someone with the experience of Metzner when a helper would suffice. Accordingly Respondent did nothing improper in selecting Hans to work at Rutland instead of Metzner.

I accordingly find and conclude that Respondent has met its burden of proving that it would have laid off Frigon, Metzner, and Mondella even in the absence of their union activities.

2. The failure to recall Frigon, Metzner, and Mondella and the refusal to rehire Frigon

Analysis and Discussion

As set forth above, I have found that Respondent validly laid off Frigon, Metzner, and Mondella at Rutland on September 26 because of a lack of work due to the contractor's failure to complete the concrete floor work. I have further found that Respondent lawfully replaced them with Hans and Harbour, and properly continued the employment of Marro and Samplatsky.

The complaint alleges that thereafter, Respondent unlawfully failed to recall Frigon, Metzner, and Mondella from layoff, while at the same time it employed workers who had never before worked for it. Respondent admits that it refused to recall Frigon from layoff, and that it refused to rehire him on about November 17.[11]

Frigon and Metzner were union activists who engaged in open and blatant union activity including picketing and handbilling, which activity came to the attention of Respondent.

I find that Respondent possessed animus toward the Union, as set forth above in Becker's threat to remove Frigon from the job. I also find animus in the other 8(a)(1) conduct set forth above. In this regard, I note that Dockendorf testified that he did not discriminate against employees based upon their union affiliation. However, the actions of Respondent's supervisors, set forth above, belies such a neutral attitude.

I accordingly find and conclude that the refusals to recall Frigon and Metzner were motivated by their union activities. *Wright Line*, supra.

I have found that at Rutland, four employees, Hans, Harbour, Marro, and Samplatsky validly continued to work for 5 weeks following the layoffs, through the week ending November 1.

On October 4 and 8, Frigon notified Respondent that he was available for work.

In the week ending November 8, the crew was expanded to six, through the addition of mechanics Hackett and Kindl. Hackett had not been employed by Respondent prior to that time. Kindl, who began work for Respondent at Rutland in the week ending September 13, was transferred from Queensbury.

Thus, 6 weeks after the layoffs of mechanics Frigon and Mondella, two new mechanics, Hackett and Kindl, were employed. Respondent admits refusing to recall Frigon because he failed to notify it of the alleged violations on the job before writing his letter of October 27. That will be discussed, infra. No reason was given for its failure to recall Mondella.

Regarding Mondella, inasmuch as Kindl had been employed by Respondent prior to the employment of Mondella, and Respondent had a practice of retaining and transferring its current employees, which will be discussed, infra, it is reasonable that Respondent would not have recalled Mondella in place of Kindl.

It is also doubtful whether Mondella should have been recalled to work, in place of the hire of Hackett. Mondella reported to work for Respondent on September 26, and was immediately laid off without actually working. He was paid for the day apparently because he reported to work. Thus, I cannot find that he possessed an actual right to be recalled from work which he never performed.

By the week ending November 15, Hackett had left, and two employees were added to the Rutland work force: Basmajian and Catone. Basmajian, a mechanic/helper with 4 to 5 years' experience, began work for Respondent for the first time in Queensbury in the week ending September 20, and was transferred to Rutland. Catone had been employed by Respondent for 6 years, and worked for it from the inception of the Queensbury job. By virtue of his seniority with Respondent, it is clear that Catone was properly retained, instead of Mondella being recalled.

[11] The complaint's allegation that Respondent refused to hire Steven Fuller for the Queensbury and Rutland jobsites was withdrawn at the hearing.

General Counsel argues that Respondent should have recalled mechanic/helper Metzner that week, rather than hire Basmajian. They both had the same experience in the industry, 4 to 5 years, and both had begun work for Respondent at the same time—in Queensbury in the week ending September 20.

I find that Respondent properly decided to transfer Basmajian from Queensbury to work at Rutland, and not recall Metzner, who I have found was lawfully laid off. When the transfer occurred, in the week ending November 15, Metzner had not been working for Respondent for nearly 2 months, having been laid off on September 26. Dockendorf testified that in mid-November he saw Metzner at work for Gleason, a union contractor, at the Rutland site. Thus, Respondent was aware that Metzner was currently employed.

In considering whether Respondent has unlawfully refused to recall Metzner for work beginning in the week ending November 15, the evidence supports Dockendorf's argument that he preferred to hire workers who applied at the jobsite, and who thus presented their ready availability to work. Metzner, being employed by another contractor, was clearly unavailable for work. That, combined with Respondent's valid selection of Basmajian for transfer from Queensbury convince me that Respondent did not unlawfully refuse to recall Metzner.

On November 17, Dockendorf admittedly refused to rehire Frigon.

The crew remained the same for 4 weeks, when, in the week ending December 13, mechanics Kingman and Tabor became employed at Rutland. Kingman had begun his employment with Respondent at Queensbury, beginning there on August 16. Tabor was not employed prior to that time for Respondent. General Counsel argues that Respondent should have recalled Mondella rather than hire Kingman and Tabor. Kingman had begun his employment with Respondent prior to Mondella's, and therefore was consistent with Respondent's practice of retaining and transferring its employees. Tabor was clearly hired after Mondella, however Respondent was justified in not recalling Mondella for the reasons set forth above, that he had not actually been employed for work to which he could be recalled, and Dockendorf had seen him working for Gleason during that period of time, and he was thus unavailable for work.

For the above reasons, even assuming that General Counsel has made a prima facie showing that Mondella's union activities were a motivating factor in Respondent's refusal to recall him, I find that Respondent committed no violation in failing to recall him. *Wright Line*, supra.

The following week, the week ending December 20, mechanic Knipes was added to the crew, which became 10. That was his first employment with Respondent. That same crew continued work thereafter through January 31, 1995, when the crew steadily declined and ended on about March 31, 1995.

Accordingly, there was no need for a person of Metzner's abilities, a 4- to 5-year apprentice during the remainder of the Rutland job, and Respondent had not hired such an individual during the remainder of that job.

In addition, Queensbury was at the height of its employment complement in the week ending September 27, when 32 workers were employed, and it could not be expected that Respondent would transfer Frigon, Metzner, and Mondella to that jobsite following their layoffs from Rutland. As set forth above, the Queensbury job immediately declined in the numbers of employees working, from 32 to 24 employees, and lower each week until the job ceased.

General Counsel argues that if work was winding down in Queensbury during the week ending September 27, Respondent should not have hired Fellman that week. Fellman testified that he visited the jobsite on September 22, spoke to Becker and Young, and that Dockendorf phoned him that evening, they agreed on a wage rate, and he was told to report to work the next day. He did so and worked for 2 weeks, at which time he quit.

Dockendorf admitted having a conversation with Fellman about hiring him, and told him that he would have to see if a job was available. Dockendorf stated that he did not hire Fellman. Rather, Fellman came to the site, misrepresented that Dockendorf had hired him, and was put to work. Later, when Dockendorf learned that Fellman had deceived him, he told Young that ''we should probably get rid of him.'' However, at that time, inasmuch as a company which Respondent had subcontracted to install a fire alarm system had defaulted, an additional worker was needed to complete that contract and Fellman was retained. Becker testified consistently with Dockendorf's testimony concerning Fellman's hire, and I credit Respondent's reasons for retaining Fellman.

As to Frigon, Dockendorf testified that he believed that Frigon's letter of October 27 was designed to, and did harm Respondent's relationship with the general contractor. He questioned Frigon's expressed interest in protecting the public and the employees by bringing alleged violations to the attention of the Queensbury inspector. Dockendorf noted that the letter was written 1 month after Frigon ended his employment at Queensbury, and argues that if Frigon was interested in the public safety he should have brought these matters to the inspector's attention immediately.

Dockendorf further stated that at the time of Frigon's letter, October 27, Respondent had 20–25 percent more work to complete on the project, the store would not open for 6 weeks, and therefore the alleged violations set forth therein would have been corrected in the normal course of completing the project. He later testified, however, that the store opened on about November 17, which was only 3 weeks after Frigon's letter.

Dockendorf testified that he directed Frigon to make him or his supervisor aware of any problems on the job, including violations. He stated that he refused to rehire Frigon for Rutland because he violated Respondent's policy by not informing his supervisors or Dockendorf that there were alleged violations on the job, and not necessarily because he sent the letter to inspector Hatin.

I find that Frigon's actions regarding the inspection of the Rutland jobsite by the Queensbury inspector constituted protected, concerted activity. Thus, on October 24, he participated in an inspection of the site with inspector Hatin, former employee Underwood, and another union official. That activity directly related to the concerns of other employees, specifically their safety on the job. Frigon joined with Underwood at the site to acquaint Hatin with the nature of the alleged violations. I credit Frigon's testimony that Dockendorf saw him at the jobsite at that time. Dockendorf also became aware of Frigon's letter to Hatin, sent on union

letterhead a few days after the inspection. See *Springfield Air Center*, 311 NLRB 1151, 1155 (1993).

Accordingly, Frigon engaged in the protected, concerted activity of complaining about safety on the jobsite, Respondent became aware of that activity, and as admitted by Dockendorf, his letter of complaint to the inspector was part of the reason for his refusal to be recalled or rehired. I thus find that General Counsel has made a prima facie showing that Frigon's protected, concerted activity was a motivating factor in Respondent's refusal to recall or rehire him. *Wright Line*, supra.

I reject Respondent's defense that Frigon was refused recall and rehire because he failed to follow Respondent's policy of informing its supervisors of any violations on the job. Frigon's letter to Hatin noted that he informed Supervisors Becker and Young of at least two of the alleged violations. In addition, I find that Frigon acted in good faith in sending the letter, which was sent shortly before the store was to be opened to the public. Frigon brought to the inspector's attention certain alleged electrical violations which could have endangered other employees or members of the public. Accordingly, the letter was not sent to harass Respondent or destroy its reputation with the general contractor.

Accordingly, if Respondent had a practice of recalling employees, rather than hiring new ones, Frigon should have been recalled to work in place of new employee Hackett being hired in the week ending November 8. *Associated Services for the Blind*, 299 NLRB 1150, 1152 (1990); *F. W. Woolworth*, 204 NLRB 396, 398 (1973).

Dockendorf determines whether to lay off an individual at the end of a job or move him to another project, depending upon the needs of the job, and the employee's length of employment with Respondent.

Although there is no direct evidence of Respondent's specifically recalling employees following their layoff from work, there is sufficient evidence that Respondent had a policy of transferring employees from job to job. Respondent had a core group of about 10 employees who it moved from project to project. As one job ended, the workers were transferred to the next job. This was the case where workers such as Basmajian, Catone, and Harbour were moved from Queensbury to Rutland to Kingston in succession, and Hans, Kindl, Kingman, and Marro were transferred from Queensbury to Rutland. O'Brian was not moved following his employment at Ogdensburg because he quit.

Further, Dockendorf testified that one such regular employee was Minervi. The payroll records establish that Minervi last worked at Queensbury in the week ending November 22, and then worked at Kingston in the week ending December 13. The record is silent as to whether he was laid off following the end of his 4-month employment at Queensbury, and recalled to work at Kingston, or whether he worked at another of Respondent's projects not at issue here, and for which time records were not produced.

Similarly, employee Olesen worked at Queensbury for 3 weeks in mid-September, and then worked at Kingston for 4 weeks in mid-December, and then at that site for 5 weeks beginning in early April 1995.

In addition, in his recorded interview with O'Brian, Dockendorf answered O'Brian's concern with being laid off by telling him that ''if you produce for me I'll keep you on . . . do a good job for me—you'll stay on—there won't be any layoffs.''

I accordingly find and conclude that Respondent had a practice of transferring its employees to its other jobsites. The only condition set forth in Respondent's doing so is, as expressed to O'Brian, that the employee do a good job. There was no evidence that Frigon did not perform his work competently. He was not criticized for poor work. Accordingly, I find based upon Respondent's practice of retaining and transferring its employees, that it would have recalled Frigon from layoff and would have rehired him for the Rutland job.

I therefore find and conclude that Respondent has not met its burden of proving that it would not have recalled Frigon, and would not have rehired him even in the absence of his union and protected, concerted activities.

3. The layoff of Grant

a. *Respondent's evidence*

Supervisor Young conceded being aware that Grant engaged in picketing, but denied that Grant was laid off for his activities on behalf of the Union. Young testified that Grant was terminated on September 26 because (a) his workmanship was ''pretty bad''; (b) he could not get along with people; and (c) he refused to follow directions. Regarding all these alleged improprieties, Young testified generally, without specifics, that he moved Grant to various job duties on the site to see if his work would improve, but it did not. Young stated that Grant performed poorly during his entire 1.5-month employment.

Young stated that Grant asked for a raise, and Dockendorf requested that he evaluate his work. Young did so, and based upon the above, the raise was not granted. Young recalled that Grant became angry once for not getting the raise, and he found him ''roaming the building'' when he should have been working.

Young further stated that Grant was not the only person laid off from Queensbury during that period of time, which was moving toward its completion in September or October. Respondent's payroll record establishes that for the week ending September 27, when Grant was laid off, employment at Queensbury was at its height—32 employees—during the entire 4-month project.[12] The following week, Respondent employed 24 employees. Those laid off during the week ending September 27 included Hans, Harbour, and Marro, who were transferred to Rutland; Olesen, a mechanic; French, a helper; and Fuller, a mechanic/helper. Olesen had been employed by Respondent for years.

Respondent's payroll records reflect that in the week before his layoff, Grant worked 45.25 hours. He stated that when he was laid off there was a considerable amount of work remaining to be done. This is supported by the payroll records. Thus, in the week of his layoff, helpers Conroy, French, and Normandin worked 41, 44, and 61 hours, respectively. Conroy and Normandin continued to be employed thereafter for 7 and 5 weeks, respectively. French was laid off in the same week as Grant, but was replaced by helper Comeau, who began work in the week that Grant was laid

[12] Included in the payroll listing are Frigon and Metzner, who were actually laid off at Rutland.

off, and continued to work for 5 more weeks. Comeau, Conroy, and Normandin continued to work until the end of the job.

b. *Analysis and discussion*

Grant was the subject of an unlawful threat only 4 days before his layoff, when Becker threatened to discharge anyone who spoke about the Union. The following day, Grant was observed by Becker speaking with Frigon, a known union activist. Three days later, Grant picketed with his coworkers, and was seen doing so by Becker and Young. Immediately after his return to work after picketing, he was told, in a taunting manner, that he would be the first to be laid off. As noted above, I found that that remark violated the Act. Later that day he was laid off.

Based upon the above, particularly the close timing between Grant's engaging in union activity which was observed by Respondent's supervisors, the unlawful threats of layoff made to him, and his actual layoff, I find that General Counsel has made a prima facie showing that Grant's union activities were a motivating factor in his layoff. *Wright Line*, supra.

I find that Respondent has not met its burden of proving that it would have laid off Grant even in the absence of his union activities. Respondent gave two inconsistent reasons for laying off Grant. The first, given at the time of his layoff, was that work was winding down, and he was no longer needed. But the evidence establishes that other helpers were continued in Respondent's employ for weeks thereafter, thus undermining Respondent's argument that Grant was not needed.

The second set of reasons, given at hearing, was that he was laid off for poor work. The inconsistent reasons themselves undermine Respondent's defense. *Pincus Elevator & Electric Co*., 308 NLRB 684, 695 (1992). In addition, its evidence of Grant's malfeasance consists of nonspecific, unsupported generalities that his work was poor, he could not get along with people, and refused to follow directions. In contrast, I credit Grant's testimony, which was given in a forthright, believable manner that his work was complimented and he was promised a raise.

I accordingly find and conclude that Respondent's layoff of Grant violated Section 8(a)(3) and (1) of the Act.

4. The layoff of Underwood

Underwood, a union member, whose union activities included picketing and driving around the jobsite with pickets holding signs, was the subject of a question by Becker as to why he was not picketing with his coworkers. His union activities were observed by Respondent's supervisors.

The close proximity in time, only 4 days, between his union activities and his layoff, taken together with Respondent's animus toward the Union, convince me that his layoff was motivated by his union activities. *Wright Line*, supra.

Supervisor Young testified that when Underwood was laid off, the job was starting to wind down, and selections for layoff were made based upon what projects the employees were involved in. At that time, according to Young, Underwood was installing receptacles, a very easy job. The other three employees ran specific pipes with different wires in them, which they tagged and were of course familiar with the work they had done. Young stated that he would have preferred to lay off the others instead of Underwood, but that it would not be efficient for him to retain Underwood to continue the projects which were started by others, since he did not pull the wire and did not mark the wire to terminate them. No evidence in contradiction of this testimony was offered.

One of Underwood's coworkers was Trombly, who was hired at the same time as Underwood and worked with him in the kitchen area. Trombly continued to work following Underwood's layoff. He apparently was one of the workers, as testified by Young, who had done specific work which required his continued presence on the job.

I accordingly find that Respondent has met its burden of proving that it would have laid off Underwood even in the absence of his union activities.

C. *The Kingston Jobsite*

Respondent was awarded a subcontract to perform certain electrical work on a project in Kingston, New York. Foreman Young began work at the site during the payroll period ending December 6.

During the period December 2–18, 1994, and March 19–26, 1995, Respondent placed advertisements in a local newspaper in Kingston, in which it sought electrician's helpers. On December 14, Local 363 sent Respondent 44 employment applications which were received by Respondent on about December 19. On December 21, Local 363 sent Respondent an additional 33 applications, which were received by it on about December 23. Letters sent by Local 363 with the applications identified them as being union members who were helpers, enrolled in the Union's apprenticeship program. Local 363 organizer Steven Rockafellow testified that all the applicants were capable of performing helpers work.

The 77 union-referred applicants did not otherwise take steps seeking employment with Respondent, and did not visit the jobsite seeking employment or otherwise contact Respondent. None of them were contacted by Respondent or hired by it.

From January 10, 1995, through the week ending April 18, 1995, Respondent employed 13 helpers, none of whom had any prior employment relationship with it. Specifically, three were hired in January, four were hired in February, three were hired in March, and three were hired in April.

Dockendorf testified that he did not consider the applications that the Union sent because he did not know whether the applicants were available for work at the time he needed them. Rather, he hired those applicants who visited the site. Hiring was based upon their visit because they showed initiative by coming to the site, and by doing so he knew that they were immediately available for work.

Dockendorf's pretrial affidavit stated that ''I will not consider the best applications from a third party because I have no way of establishing the ready availability of the applicant.''

Dockendorf testified regarding the hire of helpers for the project, as follows:

Chris Delfino and E. Licalsi faxed applications to Dockendorf: Delfino, on December 2, and Licalsi, on December 22. They began work during the week ending February 14, 1995. Dockendorf stated that he believed that Delfino came to the site after he sent his application, and

was then hired, and that Licalsi thereafter called Dockendorf about two times, including once in February.

Conceding that only 3 days before Licalsi sent his faxed application, he had received 44 applications from Local 363, Dockendorf stated that at that point neither Licalsi nor the union applicants had gone to the jobsite. Accordingly, he responded to none of their applications, and he only considered Licalsi because he called prior to the time he needed him to begin work.

Dockendorf further testified that Earl Davis came to the site on about January 5, 1995, applied for work at that time, and was hired. David Young was hired at the request of his uncle, Supervisor Gerald Young. Fred Barnes, D. Murphy, J. Sagazie, Jeff Schechter, and W. Miller also applied at the jobsite and were hired. He stated that he believed that Jeff Borock, E. Mann, D. Murphy, and T. Murphy also appeared on the jobsite, and were hired.

Dockendorf stated that there was a great supply of helpers in the Kingston area. He further stated that he hired only those applicants who appeared at the jobsite because those employees were physically present and available for work, and because of the timing—they appeared at the jobsite and were available when Respondent was hiring. Because of the necessity to hire helpers quickly, he hired those who appeared at the site and were thus immediately available to work, rather than undertake the time-consuming effort of examining the Union's package of applications, and then contacting them to determine whether they were currently available.

Dockendorf testified that he usually does not retain applications because he does not know the applicant's availability for work, since availability changes from day-to-day or week-to-week.

Analysis and Discussion

The complaint alleges and Respondent denies, that on December 14 and 21 it refused to consider for employment and refused to employ 44 and 33 named helpers, respectively, whose applications were sent by the Union.[13]

I find that General Counsel has made a prima facie showing that the fact that the applicants were union members, and that the applications were sent by the Union were motivating factors in Respondent's refusal to hire the union-referred applicants. *Wright Line*, supra. I reach this conclusion based upon the findings of animus and the 8(a)(1) findings I have made above, and the principles in *Fluor Daniel*, supra.

However, I find that Respondent has met its burden of proving that it would not have considered the union applicants and would not have hired them even in the absence of their union membership, and their being referred by the Union.

Thus, I credit Dockendorf's testimony that he considered and gave the highest priority to those applicants who appeared at the jobsite. ''Gate hiring'' is a recognized practice which Respondent has utilized in past jobs. *Bay Control*, supra. The hire of Licalsi, who was hired notwithstanding that he did not visit the jobsite prior to his hire, was satisfactorily explained by Dockendorf, and is consistent with his testimony that at the beginning of a job there is great pressure to hire large numbers of employees, and that those who appear at the jobsite or otherwise advise Respondent of their immediate availability for work, are hired. In addition to faxing his resume to Respondent, Licalsi phoned Respondent several times, including immediately before his hire, thus indicating his ready availability for work.

Dockendorf could have reviewed the union-referred applications and contacted the prospective employees to determine their availability, but given the immediate need for hiring, and the fact that qualified applicants appeared at the jobsite who were immediately available to work, Respondent was justified in conducting its hiring in the manner in which it did.

I accordingly find no violation in Respondent's refusal to consider for employment and refusal to hire the union-referred applicants.

Conclusions of Law

1. Respondent Dockendorf Electric, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Locals 300, 363, 438, and 910 of the International Brotherhood of Electrical Workers, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

3. By refusing to hire Donald Sayer, and by refusing to recall or rehire Daniel Frigon, and by laying off Christopher Grant, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By warning employees that if they speak about union matters they would be discharged, and by warning them that they could not speak about the Union, Respondent violated Section 8(a)(1) of the Act.

5. By warning employees that they could not engage in union activities or they would be transferred, Respondent violated Section 8(a)(1) of the Act.

6. By threatening to lay off employees if they engaged in union activities, Respondent violated Section 8(a)(1) of the Act.

7. By interrogating employees about their union membership and threatening to discharge them if they engaged in union activities, Respondent violated Section 8(a)(1) of the Act.

8. Respondent has not committed any violations of the Act not found here.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent offer full and immediate reinstatement to Donald Sayer and Christopher Grant, and shall recommend that Respondent offer to recall or rehire Daniel Frigon, make them whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them, less any interim earnings, to be computed in the manner established by the Board in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[13] The complaint's allegation that Respondent refused to consider for employment and refused to employ Michael Shannon for the Kingston jobsite, was withdrawn at the hearing.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Dockendorf Electric, Inc., Saratoga Springs, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire, refusing to recall or rehire, and laying off, or otherwise discriminating against employees in order to discourage them from engaging in activities in behalf of a labor organization.

(b) Warning employees that if they speak about union matters they would be discharged, and warning them that they could not speak about the Union.

(c) Warning employees that they could not engage in union activities or they would be transferred.

(d) Threatening to lay off employees if they engaged in union activities.

(e) Interrogating employees about their union membership, and threatening to discharge them if they engaged in union activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Donald Sayer the position for which he applied and offer to Daniel Frigon and Christopher Grant the positions which they held and, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make each of them whole, with interest, for any loss of earnings and benefits each of them may have suffered as a result of the unlawful treatment of them, as set forth in the remedy section of this decision.

(b) Remove from its files and memoranda, records, or other references to the unlawful refusal to hire, and to the unlawful refusal to recall or rehire, and the unlawful layoff, of Donald Sayer, Daniel Frigon, and Christopher Grant, as set forth above, and notify each of them, in writing, that this has been done and the unlawful actions taken against them will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, Social Security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Saratoga Springs office copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''